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SUPREME COURT, U.S.

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No. 108, Original

In The Supreme Court
Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

WYOMING ANSWER TO PETITION, MOTION FOR LEAVE TO FILE COUNTERCLAIM AND COUNTERCLAIM

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ANSWER

Defendant, the State of Wyoming, pursuant to the Court's order dated January 20, 1987, answers the State of Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief as follows:

1. The allegation in paragraph 1 of the Petition is admitted, subject to the following qualifications:

> (a) The Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), as modified, 345 U.S. 981 (1953) ("the Decree"), does not define the extent of Wyoming's right to use water from the North Platte River basin. The Decree does impose certain restrictions on water uses in Wyoming. Wyoming is entitled to use water beneficially from the North Platte River basin, subject only to the restrictions specified in the Decree.

(b) The apportionment of North Platte River natural flows to Nebraska provided by the Decree is only to supply the present beneficial use requirements of lands supplied by diversions at or above Tri-State Dam (including the Ramshorn Canal), up to the amount of water required by such lands irrigated at the time of the Decree. No other interests in Nebraska have any rights to natural flows of the North Platte River under the Decree.

2. The allegations in paragraph 2 of the Petition are denied. Pathfinder and Guernsey Reservoirs are operated for the benefit of lands in both Nebraska and Wyoming. The "restraints on storage" in those reservoirs (as well as Seminoe, Alcova and Glendo Reservoirs) provided by Paragraph IV of the Decree require that they be operated as junior to the priorities of the State Line Canals and the French Canal to the extent of the requirements of the Nebraska lands supplied by those canals, up to the instantaneous and seasonal diversion limitations specified in said Paragraph IV.

3. Wyoming denies each allegation in paragraph 3 of the Petition that it is "presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree". Wyoming denies that it has violated or threatens to violate the Decree in any respect. Wyoming answers further:

(a) Wyoming admits that Grayrocks Reservoir causes certain depletions of the flows of the Laramie River, but denies that such depletions violate the Decree. Wyoming states further that the water rights for Grayrocks Reservoir are administered in accordance with Wyoming law.

(b) Wyoming admits that the Corn Creek Irrigation District proposes to construct the Corn Creek Project, including diversion facilities near the mouth of the Laramie River. The project would be supplied primarily by storage water from Grayrocks and Glendo Reservoirs, and also by natural flow diversions from the Laramie River. Wyoming denies that the resulting depletions would violate the Decree.

(c) Wyoming admits that the Wyoming Water Development Commission, an agency of the State, proposes to construct Deer Creek Reservoir, a municipal storage project, on Deer Creek, a tributary of the North Platte River between Pathfinder and Guernsey Reservoirs, and that the project will cause certain depletions to Deer Creek and consequently to the North Platte River. Wyoming denies that such depletions will violate the Decree.

(d) Wyoming admits that on October 3, 1986 (before this suit was filed by Nebraska), Wyoming filed a suit on behalf of the Wyoming State Engineer against the United States in a Wyoming District Court relating to four reservoirs in Nebraska known as the Inland Lakes. The suit seeks to require the Bureau of Reclamation to comply with Wyoming law in its diversion of North Platte River natural flows in Wyoming for storage in the Inland Lakes. Wyoming denies that the filing of the lawsuit or the granting of the relief requested therein

would violate Nebraska's rights under the Decree. Wyoming asserts that the Bureau of Reclamation has no right to divert natural flow water in Wyoming for storage in the Inland Lakes without the permits required by Wyoming law. Wyoming denies that its officials have taken any other action to prevent the Bureau of Reclamation's diversion of North Platte River water for storage in the Inland Lakes.

4. Each allegation in paragraph 4 of the Petition is denied.

5. Each allegation in paragraph 5 of the Petition is denied. Wyoming denies that Nebraska has made any earnest effort to resolve the matters raised by the allegations in its Petition.

6. Each allegation in paragraph 6 of the Petition is denied.

7. Each allegation in paragraph 7 of the Petition is denied.

8. Wyoming admits the allegation in paragraph 8 of the Petition, subject to the following qualification: The relief requested in the Petition is enforcement of the existing Decree; "Nebraska does not seek to modify the Decree in any respect. . . ." Nebraska Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 2. In Paragraph XIII of the Decree, this Court retained jurisdiction for the purpose, *inter alia*, of enforcement of the Decree and thus has retained jurisdiction for purposes of the relief requested in this suit. The

Court's jurisdiction has not been invoked for any other purpose, and the references in the Petition to the Court's retained jurisdiction for other purposes therefore are irrelevant.

9. Each and every allegation in the Petition not expressly admitted or denied is hereby denied.

AFFIRMATIVE DEFENSES

1. Nebraska's Petition does not allege facts which, if true, would establish any violation or threatened violation of the Decree.

2. Nebraska has no right to water from the Laramie River because the Laramie River was fully apportioned between the states of Wyoming and Colorado in *Wyoming v. Colorado*, 259 U.S. 419, *modified*, 260 U.S. 1 (1922); 353 U.S. 953 (1957). A claim to water from the Laramie River was asserted by Nebraska and rejected by this Court in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and that matter is *res judicata*.

3. Nebraska agreed to the construction and operation of the Grayrocks Reservoir in an Agreement of Settlement and Compromise dated December 4, 1978, among Nebraska, Basin Electric Power Cooperative (the operator of Grayrocks Reservoir) and others. That agreement provided for the construction and operation of Grayrocks Reservoir. Nebraska is estopped to assert that construction or operation of Grayrocks Reservoir in accordance with that agreement violates Nebraska's rights under the Decree.

4. Nebraska's claim here to water from the Laramie

River was previously asserted by Nebraska in a court of competent jurisdiction. *In re Corn Creek Irrigation District*, Civil Action No. 19-460, District Court, Eighth Judicial District of Wyoming. The decree entered by that court on January 20, 1978, determined that Nebraska had no right to water from the Laramie River under the North Platte Decree or otherwise. Nebraska chose not to appeal that determination. The time for appeal has expired, and that determination bars Nebraska's claim to Laramie River water in this proceeding or any subsequent proceeding.

5. Nebraska's claim to water from the Laramie River is barred by laches.

6. The Deer Creek Project is a proposed municipal storage project to supply water for ordinary and usual municipal purposes and consumption within the meaning of Paragraph X of the Decree. Therefore, Nebraska has no right under the Decree to complain about construction of Deer Creek Reservoir.

7. The Decree does not in any way restrict the use of water from any of the tributaries of the North Platte River below Pathfinder Dam. Therefore, the construction of Deer Creek Reservoir will not violate the Decree.

8. Nebraska's rights to natural flows under the Decree are limited to the irrigation canals specified in the Decree that supply lands in Nebraska with water diverted at or above Tri-State Dam (including the Ramshorn Canal). To the extent that Nebraska's claims here are asserted on behalf of interests other than those canals, Nebraska's claims are not cognizable under the Decree.

9. In the proceedings in which the Decree was entered, Nebraska affirmatively argued, and this Court determined, that the United States is subject to the laws of Wyoming with respect to the diversion or storage of water from sources in Wyoming. Nebraska is barred from asserting otherwise now.

10. The pending civil action regarding the Inland Lakes referred to in paragraph 3(d) of Wyoming's answer herein was initiated prior to this suit. That action was filed by Wyoming in a court of competent jurisdiction to determine the extent of the rights of the United States, a Wyoming appropriator, to divert the natural flows of the North Platte River in Wyoming for storage in the Inland Lakes. That pending action is the appropriate one to determine the water rights of the United States.

MOTION FOR LEAVE TO FILE COUNTERCLAIM

Defendant, State of Wyoming, hereby requests leave of the Court to file the counterclaim submitted herewith. The grounds for this motion are:

The Court has granted leave to Nebraska to file its Petition for an Order Enforcing Decree and for Injunctive Relief, and Wyoming has answered that Petition. The counterclaim submitted herewith would be permitted under FED. R. CIV. P. 13(b). The Federal Rules of Civil Procedure may be taken as a guide to procedure in original actions in this Court. SUP. CT. R. 9.2. The counterclaim would not unduly complicate this litigation, but instead would further clarify the parties' rights under the Decree. In the interests of judicial economy and equity, Wyoming should be allowed to seek redress

in this original action for Nebraska's violations of Decree.

The United States and Colorado have not filed pleadings disclosing their positions in this proceeding. Wyoming therefore reserves the right to assert claims against those parties after their status and position have been disclosed.

COUNTERCLAIM

Defendant, State of Wyoming, assert the following counterclaim against Plaintiff, State of Nebraska:

1. This Court has jurisdiction of this counterclaim under Article III, Section 2, Clause 2, of the Constitution of the United States, under Title 28, United States Code, Section 1251(a), and under Paragraph XIII of the Decree.

2. Nebraska has intentionally circumvented and violated the Decree, and continues to do so, by the following actions:

(a) By demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam (including the Ramshorn Canal) in excess of the present beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree;

(b) By demanding natural flow and storage water from sources above Tri-State Dam and by-passing it or diverting it for uses below Tri-State Dam that are not recognized or authorized by the Decree; and

(c) By using Glendo Reservoir water outside of the basin of the North Platte River in western Nebraska, for uses other than irrigation and as a substitute for storage water previously available under permanent arrangements.

3. Nebraska's past and continuing violations of the Decree have caused and continue to cause irreparable injury to Wyoming and its citizens.

4. Wyoming has no adequate remedy at law to enforce its rights against Nebraska. Injunctive relief is necessary to enforce the Decree and to restrain further violations by Nebraska.

WHEREFORE, having fully answered and having asserted its affirmative defenses and counterclaim, Defendant Wyoming prays that the Court enter an order granting judgment for Wyoming and against Plaintiff Nebraska on each of Nebraska's claims and on Wyoming's counterclaim, and enjoining Nebraska from further violations of the Decree.

Wyoming further requests the Court to appoint a Special Master in this action. Wyoming has submitted herewith a Motion for Appointment of Special Master.

Respectfully submitted,

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